IN THE HIGH COURT OF JUDICATURE AT PATNA
Cr.Misc. No.19838 of 2007

1. JUNAID AKHTAR @ MD. JUNAID AKHTAR @ ZUNED AKHTER SON OF MD. FAIYAZ ALAM
2. MD. FAIYAZ ALAM @ FAIYAJ ALAM@ FAIYAZ ALAM, SON OF LATE HAJI NASIMUDDIN

BOTH RESIDENTS OF VILLAGE- PACHGACHHI POLICE STATION-BALIA, BELONE (KADWA), DISTRICT-MUNGER

---------- **PETITIONERS**

Versus

1. THE STATE OF BIHAR
2. MD. ASGAR ALAM SON OF MD. SAHABUDDIN AHMED RESIDENT OF VILLAGE-PACHGACHHI, POLICE STATION-BALIA BELONE (KADWA), DISTRICT-KATIHAR

---------- **OPP.PARTIES**

For the petitioners : Mr. Najeeb Ahmad, Advocate
For the State : Mr. Jharkhandi Upadhaya, A.P.P.

O R D E R

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One Md. Asgar Alam, the complainant, impleaded herein as Opp.Party no.2, filed complaint case no.319 of 2006 on 18.2.2006 arraying as many as 21 persons and alleging at their hands the commission of offences under Sections 147,148,149,379,504 I.P.C. from 8.2.2006 to 10.2.2006. However, following the enquiry under Section 202 Cr.P.C. Sri N.Prasad , Judicial Magistrate, First Class, Katihar, took cognizance by order dated 28.9.2006 only against the two petitioners herein and that too under Sections 323,429,379 I.P.C. only and issued process against them. Aggrieved thereby, the two petitioners have preferred this application for quashing of the said order taking cognizance and issuing process.

For understanding the matter a brief narration of the facts

would be gainful. The complainant along with petitioner no.1 herein had jointly taken on lease 1.54 decimals of *jalkar* appertaining to *Khata* no.73, *Kheshra* no.519 in *mouza* Meenapur for the period 2001 to June,2006 from the recorded *Khatedars* and having paid the consideration and obtained possession of the *jalkar* they cultivated fish therein jointly, sold the fish and divided the amount equally. It is alleged that after sometime petitioner no.1 came into contact with the enemies of the complainant and began to create disturbances for him and finally from 8.2.2006 to 10.2.2006 all the accused having formed an illegal assembly, armed with deadly weapons like country-made pistol, *farsa* and *Kapasi* net, began fishing in the *jalka*r without the consent of the complainant and when the complainant remonstrated he was threatened in various ways. The accused allegedly took away fish worth Rs.1, 45,000/- . Information given of the incident to the Police Station evinced no interest from them. The delay in lodging the case has also been explained.

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The submission on behalf of the petitioners is that the *jalkar* had been taken on lease by the complainant and petitioner no.1 jointly which would mean that both of them were in joint possession of the *jalkar* and in such a situation the learned court below had erred grossly in taking cognizance of an offence under Section 379 I.P.C. as the ingredients of the offence of theft had not been made out.

It was next submitted by the learned counsel for the petitioners that even an offence under Section 429 I.P.C. is not made out from the allegations made in the complaint petition. Section 429

relates to commission of mischief by killing, poisoning, maiming or rendering useless any animal whatever may be value thereof.

Even an offence under Section 323 I.P.C. does not appear to have been made out since there is no allegation against the petitioners of their having assaulted the complainant and it is apparently clear that the instant complaint had been filed only to harass the petitioners into submitting to the views and fancies of the complainant and notwithstanding the same the learned court below has taken cognizance in a mechanical way without applying his mind to the facts and circumstances of the case.

Although notice was duly served on the Opp.Party no.2, he has chosen not to appear and contest this application. Therefore, there is no rebuttle from his side to the submissions advanced by the learned counsel for the petitioners. Even the learned A.P.P. is not in a position to support the impugned order and he has very candidly stated that none of the three offences whereunder cognizance has been taken appears to have been made out from the recital in the complaint petition or from the evidence adduced by the witnesses examined at the enquiry.

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Admittedly, the complainant and petitioner no.1 had jointly taken lease of the *jalkar* in question and their relationships would virtually amount to that of a partner or a coparcener. If that be the position, every partner or coparcener in the eye of law is agent of the other and no partner or co-sharer can commit theft of property, which is the subject matter of partnership or in joint possession of co-sharers.

The learned counsel for the petitioners is right in stating that no offences under Sections 379,429 and 323 I.P.C. appear to have been made out in the complain petition or in the evidence of the witnesses recorded at the enquiry under Section 202 Cr.P.C. and the reasons assigned , therefore, are worth accepting.

In the facts and circumstances of the case, the application is allowed and the cognizance taken by the learned court below is hereby quashed.

(Abhijit Sinha, J)

Patna High Court,Patna
Dated: the 3rd December,2008
Nawal Kishore Singh/ A.F.R.

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